

- “(1) Whether the administrative law judge erred in finding that the initial \$40,000.00 payment mentioned in K.S.A. 44-510b(a) is not stayed pursuant to K.S.A. 44-551 and K.S.A. 44-556 when the underlying award is pending on appeal.
- “(2) Whether the administrative law judge erred in assessing penalties against respondent.
- “(3) All other issues decided adversely to respondent and insurance carrier.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The deceased, Benny Titterington, died on April 18, 2001. He was driving from Columbus, Kansas, to Pittsburg, Kansas, when he was involved in a single-car accident. A dispute arose thereafter regarding whether claimant died from massive chest trauma as a result of the accident or whether claimant suffered a heart attack prior to receiving these chest injuries. That issue was decided in favor of claimant's beneficiaries in an Award issued by Administrative Law Judge Jon L. Frobish dated December 11, 2002. That Award was timely appealed to the Workers Compensation Board pursuant to K.S.A. 44-551. The Board received briefs and heard oral argument, with the matter being deemed submitted to the Board as of June 10, 2003. The Board's Order was issued June 25, 2003. The matter was then timely appealed to the Kansas Court of Appeals pursuant to K.S.A. 44-556. That statute states in part:

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.¹

At the time the initial Award was entered by the Administrative Law Judge, there was confusion regarding the status of the dependents of the deceased. The Administrative Law Judge, in his Award, stated:

The Court is unsure of the status of the dependents in this matter and would request that the Claimant's counsel prepare this award section to be submitted to the Court for approval which will then become part of this award.

The initial Award did not discuss the status of the beneficiaries. Judge Frobish then issued a subsequent Award July 16, 2003, which clarified the status of the living dependents. It also ordered that the initial payment of \$40,000 be paid pursuant to K.S.A. 44-510b, followed by 840 weeks of benefits in the amount of \$250 per week, totaling \$210,000. The Administrative Law Judge ordered that the \$40,000 be apportioned between the surviving spouse and two wholly dependent children, all three of whom were identified in this subsequent Award. It is clear from the Award that the \$40,000 lump sum ordered paid pursuant to K.S.A. 44-510b(a) was ordered paid as an initial payment, with weekly benefits to commence April 18, 2001.

¹ K.S.A. 44-556(b).

The Administrative Law Judge's Order is consistent with K.S.A. 44-510b(a), which states:

There shall be an initial payment of \$40,000 to the surviving legal spouse or a wholly dependent child or children or both. . . . The initial payment shall be immediately due and payable and apportioned 50% to the surviving legal spouse and 50% to the dependent children.

After the matter was appealed to the Kansas Court of Appeals, the Kansas Supreme Court, on January 15, 2004, pursuant to K.S.A. 20-3018(c), ordered the Court of Appeals to transfer this matter to the Supreme Court for review and final determination. That matter is currently before the Kansas Supreme Court, awaiting its determination.

Effective April 16, 2003, respondent began making payments of weekly benefits as required by K.S.A. 44-556(b). April 16, 2003 is ten weeks prior to the Board's Order of June 25, 2003. As of this appeal, those weekly benefit payments continue, pending the determination by the Kansas Supreme Court.

On September 12, 2003, claimant issued a Demand For Compensation, requesting all benefits due and owing pursuant to the July 16, 2003 supplemental Award of the Administrative Law Judge. In particular, claimant sought payment of the lump sum \$40,000 payment, due and owing under K.S.A. 44-510b(a). In his Order of January 29, 2004, Administrative Law Judge Kenneth J. Hursh awarded claimant penalties for 27 weeks from July 19, 2003, at the rate of \$100 per week, totaling \$2,700. The penalties were ordered paid one-half to the surviving spouse and one-fourth to each of the two dependent children named in the July 16, 2003 supplemental Award of Judge Frobish. Respondent objects to the penalties, contending that the \$40,000 lump sum payment is controlled by the stay provisions of K.S.A. 44-556.

The Administrative Law Judge, in the January 29, 2004 Order, found that the July 2003 supplemental Award was not controlled by the stay, holding that the respondent's liability for compensation was established December 11, 2002, but that no compensation was due until July 2003, when the supplemental Award was issued. However, as noted above, the initial Award of December 11, 2002, states, with regard to the status of the dependents, that claimant's counsel was ordered to prepare an award section to specify the status of the dependents and that that award section would then "become part of this award." It was clearly contemplated by the Administrative Law Judge and ordered that any supplemental award dealing with the status of the dependents would revert back to the initial Award of December 11, 2002. Additionally, K.S.A. 44-510b states that the initial payment of \$40,000 "shall be immediately due and payable." The Board, therefore, finds that the \$40,000 lump sum payment is an initial payment due and owing immediately after the death occurs. Therefore, rather than becoming due in July of 2003 with the supplemental Award, the \$40,000 lump sum payment became due as of April 18, 2001,

the date of Benny Titterington's death. That payment would, therefore, be controlled by K.S.A. 44-556, and the appropriate stay provisions of that statute would apply.

K.S.A. 44-512a allows for a penalty of up to \$100 per week for each week "any disability compensation is past due."² As, pursuant to K.S.A. 44-510b and K.S.A. 44-556, the \$40,000 lump sum payment was stayed, it would not become past due. To award penalties under K.S.A. 44-512a for failure to pay that amount was error on the Administrative Law Judge's part.

The Board, therefore, finds that the award of penalties under K.S.A. 44-512a should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Kenneth J. Hursh dated January 29, 2004, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-512a(a).